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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 946

CANADA PACKERS, LIMITED,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTE FE RAILWAY COMPANY, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE.

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Due: January 24, 1966.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 346.

CANADA PACKERS, LIMITED,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTE FE RAILWAY COMPANY, ET AL.,[1]

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' REPLY TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE.

STATEMENT.

In response to the Court's order of October 11, 1965, the Solicitor General has submitted a Memorandum expressing the views of the United States. Therein the

1. The Atchison, Topeka and Santa Fe Railway Company; The Chesapeake and Ohio Railway Company; Chicago, South Shore and South Bend Railroad; Detroit, Toledo and Ironton Railroad Company; Elgin, Joliet and Eastern Railway Company; Grand Trunk Western Railroad Company; New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Wabash Railroad Company.

Solicitor General urges that the petition for a writ of certiorari be granted.

DISCUSSION.

It is submitted by respondents that the reasons advanced by the Solicitor General will, upon careful analysis, be found insufficient to warrant review by the Court on certiorari. The basic issue here is whether the Interstate Commerce Commission, in assessing damages on account of unreasonable freight charges for railroad transportation of shipments of potash from New Mexico, may penalize carriers to a greater extent on petitioner's international shipments moving into Canada than on contemporaneous shipments traversing only the United States portion of such routes, with the penalties made progressively more severe in relation to the quantity of transportation that takes place within Canada.[2]

Respondents are not in disagreement with much of the discussion of general principles contained within the Memorandum for the United States and, in this reply, will, in so far as is practicable, discuss only the propositions upon which there is disagreement.

1. On page 5 of his Memorandum, the Solicitor General makes the following statement:

> "Because the rate is an undivided and unapportioned charge for the entire through movement, including both the American and the foreign segments, the extent of the overcharge applicable to the American segment is unknown."

Although the foregoing statement might be pertinent as

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2. A question of interpretation of the Commission's reparation order was also considered, but not resolved, by the Court of Appeals. This issue was not referred to by the Solicitor General, although it was discussed in the Brief for Respondents In Opposition (pp. 3-4).

applied to situations in which the crucial question of reasonableness or unreasonableness was truly unknown, it is not applicable to the instant situation. As the Court of Appeals pointed out (342 F. (2d) 563, 564), the Interstate Commerce Commission itself, in *Consolidated Rendering Company* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 300 I.C.C. 87 (1957), had made a finding as to maximum reasonable rates on potash from the origins in New Mexico to the border crossings at Detroit and Port Huron retroactively to the very period of time within which petitioner's shipments moved (App. A of Petition, pp. 3-4; App. Dfts.[3] pp. 30-33). This case, therefore, unlike either *News Syndicate Company* v. *New York Central Railroad Co.*, 275 U. S. 179 (1927), or *Lewis-Simas-Jones Co.* v. *Southern Pacific Company*, 283 U. S. 654 (1931), involves the unusual circumstance of the Commission having made a determination of a just and reasonable rate between the New Mexico origins and the border points through which the Canada Packers shipments passed en route to the destinations in Canada. Awarding a greater quantum of damages in connection with the Canada Packers shipments, where those shipments differed only because additional transportation was performed beyond the Canadian border, clearly identifies the award as an attempt by the Commission to regulate rail transportation within Canada, in violation of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)). That section explicitly confines the Commission's jurisdiction "only in so far as such transportation takes place within the United States."

2. On page 10 of his Memorandum, the Solicitor General discusses the question of apportioning damages resulting from an unjust and unreasonable joint international rate and makes the following suggestion:

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3. For brevity, the Appendix of Defendants-Appellants is referred to here as App. Dfts.

> "The burden of limiting its liability would be on the carrier. It would be required to prove the amount of the just and reasonable charge for the American segment of the shipment under the joint rate."

This is precisely the burden that has been sustained by the respondents. No better proof of the measure of unreasonableness of the American portion of the joint international rate could be found than a specific finding by the Interstate Commerce Commission of what a contemporaneous maximum reasonable charge should be for the American portion of the international shipments, and that was determined by the Commission's decision in *Consolidated Rendering Company* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 300 I. C. C. 87 (1957). In fact, not only did the *Consolidated Rendering* case contain findings as to maximum reasonable rates to the border crossings, but that decision was relied upon by the Commission in this case as its direct authority for a finding that the joint international rates were unjust and unreasonable to the extent that certain general rate increases temporarily authorized by the Commission were later found excessive (App. Dfts. pp. 14-20).

3. The Court of Appeals held that where, as here, carriers had sustained their burden of mitigating damages by demonstrating a maximum reasonable standard for the United States portion of the through transportation, no damages beyond that measure could be awarded without constituting a regulation of transportation that took place within Canada (342 F. (2d) 563, 565; App. A. of Petition, pp. 5-6).

The Solicitor General apparently disagrees with the Court below in two respects: (a) in its determination that the respondents properly had met the burden of mitigating damages, and (b) even if that burden had been met, a somewhat different method of calculating damages should have been employed.

As to his claim that respondents had not met the burden of mitigating damages by reliance upon a decision of the Commission as to maximum reasonableness of rates to the border crossings, the Solicitor General states (p. 13):

> "Obviously, a rate that includes a terminal charge for unloading at the border is not a fair measure of the charge applicable to the American segment of a continuous shipment to a foreign destination."

There is no basis in the record for the Solicitor General's assumption that the rates on potash to Detroit and Port Huron, the border crossings involved, included "a terminal charge for unloading." Not only is there no reason to assume that the carrier performed the service of unloading in connection with such rates, but, in *Consolidated Rendering Company* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 300 I. C. C. 87, 95 (1957), the Commission made the following observations:

> "Potash is moved from the mines to a processing center in the plant area by the shipper. From the plant, the shipper moves it to the originating carrier's hold tracks, and from thence it is transported to primary fertilizer-mixing plants. *Terminal operations are relatively simple.*" (Emphasis supplied.)

See also *Woodward & Dickerson, Inc.* v. *International Great Northern Railroad Co.*, 287 I. C. C. 296, 298 (1952), in which the Commission pointed out that the duty of unloading carload shipments ordinarily rests with the consignee, rather than with the carrier.

Reliance upon the prescribed rates to the border crossings as a maximum guide in awarding damages on these shipments to Canadian destinations will, in a very real sense, prevent the reparation award from having an extraterritorial effect in violation of the restrictions of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)).

For example, the record discloses that the Commission

found, in *Consolidated Rendering Company* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 300 I. C. C. 87 (1957), that at the time petitioner's shipments moved in 1948 the maximum reasonable rate which the carriers could charge on potash from Carlsbad, New Mexico to Detroit was $12.70 a ton, and the Commission awarded reparation in the amount of 62¢ per ton since the carriers had assessed a rate of $13.32 per ton (App. Dfts. pp. 18, 32-33). In the instant case the Commission, citing its *Consolidated Rendering* decision as its authority, held that the rate of $14.60 which the carriers assessed on the Canada Packers shipments that moved from Carlsbad to Toronto via Detroit was in excess of a maximum reasonable rate of $13.80, and awarded reparation for the difference, 80¢ per ton (App. Dfts. pp. 18, 30, 32-33). Obviously, by awarding reparation in the amount of 62¢ per ton on shipments that terminated at Detroit and in the amount of 80¢ per ton on shipments that crossed the international boundary at Detroit and terminated at Toronto, the Commission was awarding 18¢ per ton damages attributable solely to transportation performed in Canada by Canadian railroads.

Furthermore, the Commission has attempted to escalate the damages in direct proportion to the amount of transportation performed within Canada. Thus, in those instances in which petitioner's shipments crossed the border at Detroit and went beyond Toronto to Montreal, the Commission awarded damages not merely to the extent of 62¢ per ton (as at Detroit), or even 80¢ per ton (as at Toronto), but in the much greater sum of $1.20 per ton (App. Dfts. pp. 18, 30, 32-33). Yet, manifestly, the only difference between the shipments terminating at Toronto and those terminating at Montreal consists of the additional transportation service *within Canada* received by the latter, and the greater

damages awarded on such shipments can be attributed only to excessive zeal on the part of the Commission in its efforts to regulate Canadian transportation.

Concerning the question of computing damages, the Solicitor General states (p. 13):

> "Second, in computing damages, the court erroneously subtracted the charge attributable to the American leg of the international shipments from the independent rates actually published by the American carriers, rather than from the divisions received by the American carriers under the joint rates."

Respondents submit that the Solicitor General's statement as to what the Court of Appeals did in computing damages is confusing. What the Court actually held is that the damages should be based on the difference between the rates published to the border crossings at the time the shipments moved and the maximum reasonable rates to the border which the Commission found should have been in effect at that time ($13.32 versus $12.70 per ton, or a difference of 62¢ per ton).

Apparently the Solicitor General would prefer that damages be computed by subtracting the maximum reasonable charge for the United States portion of the international transportation from the divisions received by the United States carriers. This suggestion is not without merit inasmuch as it would seem to insure that the United States carriers would not be required to pay damages representing payment for transportation performed within Canada, and the practical result might not differ in substance from the disposition by the Court of Appeals. The basis for such an award of damages is questionable, however, since it has been held by this Court that the division of a joint rate among participating carriers is a matter which does not concern the shipper. *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 234 (1925).

It is submitted that the method approved by the Court of Appeals for computing damages is more appropriate, since the award to the shipper is identifiable readily as the portion of the unreasonable charges paid by the shipper that is attributable to transportation performed within the United States.

4. The following statement appears on page 13 of the Memorandum:

> "Thus, in the present case, the shipper had no real choice between the American carriers' independent rates and the joint through international rates; he had to pay the latter. Why, then, should the independent rates limit the shipper's damages?".

The foregoing comment implies that the the Court below limited the shipper's damages because of the mere existence of "independent rates," presumably referring to rates contemporaneously in effect to the border crossings. That is not what is involved here. What the Court of Appeals did hold is that, where the Commission has made a finding of what would be a maximum reasonable rate to the border crossing, that finding becomes the maximum standard in assessing damages on shipments that moved contemporaneously through that crossing to various destinations beyond the border.

Responding to the specific question raised above, the maximum reasonable rate to the border should indeed limit the shipper's damages, for otherwise, in conflict with the provisions of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)), the shipper would be receiving damages from American railroads on account of charges for transportation performed within Canada by Canadian railroads. Obviously the award cannot be deemed to relate only to transportation within the United States, for the Commission expressly found that the measure of unreasonableness in the charges from Carlsbad to Detroit

was 62¢ per ton. It would be contrary both to logic and to law to say that the Commission can hold contemporaneously that the charges from Carlsbad to Detroit were unreasonable by 62¢, 80¢, and $1.20. The only way to explain the difference between the 62¢ award and the 80¢ and $1.20 awards is that the latter two are a measure of the unreasonableness which the Commission found to exist for the hauls beyond Detroit. The decision of the Court of Appeals thus has the salutary effect of restricting the Commission's award of damages within the confines of Section 1(2) of the Interstate Commerce Act (49 U. S. C. § 1(2)) as construed in *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, 621 (1945), in which the Court declared:

> "These decisions simply meant that whatever power Congress might have to regulate the conduct of its domestic companies doing business abroad, it had, by the limiting provisions of the 1920 Act, expressed its purpose not to empower the Commission with general authority to regulate rail transportation within foreign countries."

CONCLUSION

The issue here is whether petitioner is entitled to additional damages in the amount of $1,390.55, plus interest, clearly attributable, within the unique circumstances presented, to the allegedly unreasonable charges for transportation performed in 1948 within Canada. Review by the Court on certiorari is not warranted.[4]

Respectfully submitted,

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Due: January 24, 1966.

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4. The views of the Interstate Commerce Commission are presented in a footnote to the Solicitor General's Memorandum (pp. 14-15). The Commission mistakenly describes the issue here to be whether the award of damages can be limited territorially by the mere filing of an "intermediate rate legally applicable to the domestic leg." Respondents submit that the real issue is whether the Commission, in assessing damages, may penalize carriers to a greater extent on international shipments moving into Canada than on contemporaneous shipments traversing only the United States portion of such routes, with the penalties on the international shipments made progressively more severe in direct relation to the amount of transportation performed within Canada.

PROOF OF SERVICE

I, Harvey Huston, attorney for respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of January, 1966, I served the foregoing reply as follows:

On petitioner by mailing a copy, properly addressed, with first-class postage prepaid, to Charles B. Myers, 611 Field Building, Chicago, Illinois, 60603;

On the United States by mailing copies, properly addressed, with air mail postage prepaid, to each of the following: Thurgood Marshall, Solicitor General, Donald F. Turner, Assistant Attorney General, Richard A. Posner, Assistant to the Solicitor General, Robert B. Hummel, Attorney, and John T. Marshall, Attorney, Department of Justice, Washington, D. C., 20530.

HARVEY HUSTON.